Petition

81-1880

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN W. HALL, JR., *Petitioner,*

v.

BOARD OF TRUSTEES OF THE ARKANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the factually unsupported arguments of the state attorney general that there is a rational basis for economic legislation is sufficient to sustain the legislation under an equal protection challenge where the legislative distinction between classes of public employees is admittedly arbitrary and there is nothing in the record or statute or its history showing a legislative purpose for the distinction.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, which

was submitted for publication but not yet reported, is reprinted in Appendix A, beginning at page A-1, infra. The opinion of the United States District Court for the Eastern District of Arkansas, which is unreported, is reprinted in Appendix B, beginning at page A-6, infra.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit affirmed the dismissal of petitioner's claim on Feburary 12, 1982. This petition for certiorari is filed within sixty days of that date.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Fourteenth Amendment:

Section 1. . . . No state shall make

or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ark.Stat.Ann. § 12-2511(C)(a) (Repl.1979) (APERS):

C.(a) In the event a former member has left the employ of a participating public employer and requests a refund of his accumulated contributions; he shall be paid such contributions upon his written application for these funds . . . . Such former member may receive interest on such contributions if he has had accumulated contributions standing to his credit in the Members Deposit Account for at least five (5) years between the date he became a member of the system and the date he requests such refund of contributions. . . .

Ark.Stat.Ann. § 76-1912(c) (Repl.1981) (highway employees):

(c) In the case of withdrawal from the service with [within] less that [than] one year after having become a member of the System, the board upon request shall pay to the member all of his accumulated contribu-

tions without interest. If withdrawal occurs after one (1) year of membership in the System, the Board upon request shall pay to the member all of his accumulated contributions plus interest as determined by the Board, with the further provision that the members so reimbursed shall have no legal claim on any contribution made by the State with a view to their retirement. . . .

Ark.Stat.Ann. § 80-1442(8.02)(a) (Repl. 1980) (teachers):

(a) The members deposit account shall be the account in which shall be accumulated at regular interest the members' contributions to the System, and from which shall be paid refunds of accumulated contributions and transfers as provided in this act. . . .

(b) The contributions of a member to the System shall be credit to his individual account in the members deposit account, together with regular interest thereon. . . .

STATEMENT OF THE CASE

1. Introduction and parties

This action presents an equal protection challenge to the Arkansas statute denying

the payment of interest to former members of the Arkansas Public Employees Retirement System (APERS) when they leave public employment before they are statutorily eligible for the payment of interest.

Petitioner was a former Deputy Prosecuting Attorney in Pulaski County, Arkansas, who was a member of APERS for less than four years.[1] Stipulation,¶s 3.1-3.3 (hereinafter cited as "S,¶ ___"). When petitioner left the Prosecuting Attorney's Office, $2,115 in forced contributions (6% of gross salary) to the APERS was refunded to him without interest. S,¶s 3.7-3.14. Under Arkansas law, APERS members do not receive interest on their refunded contributions to that state employees' retirement plan until after the fifth year. Ark.Stat.Ann. § 12-

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1. Petitioner was in the Prosecuting Attorney's Office over 6 years but was a member of APERS less than four years. It is not important why. The factual statement of the Court of Appeals to that effect is in error.

2511(C)(a) (Repl.1979).[2]

Petitioner, a member of the bars of Arkansas, the District of Columbia, and of this Court, brought this action pro se on his own behalf and as a class representative of over 20,000 former members of APERS who had funds withheld from their paychecks under Arkansas law for the benefit of the APERS and who left public employment and the APERS before their funds were on deposit for five years and who received no interest on refund of their money. S,¶s 4.3, 3.14. The claim for relief was based on 42 U.S.C. § 1983, and jurisdiction was not contested. S,¶ 2.5. Petitioner sued the Board of Trustees of the Arkansas Public Employees Retirement System and the Board members in their official capacities. The respondent trustees are William Fleming, Col. Kenneth Milhoan, Nancy Hall, Jimmie Lou Fisher, Dr. R.L. Qualls, Fay Mathis, Marion Hickey, Edwin Fults, and Edwin Waddell. Also sued was Fred Henne, the Di-

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2. All further references to the statutes in Ark.Stat.Ann. §§ 12-2501 et seq. and 12-3301 et seq. (Repl.1979) are to the section number.

rector of the Arkansas Public Employees Retirement System. (The respondents will hereafter be referred to collectively as "the state" since they are merely enforcing state law.)

The class was certified, the facts were stipulated, and the case submitted on the stipulation and briefs. By the time issue was joined in the District Court, there were three basic issues in the case. First, the state pays interest on deposits with the Teacher Retirement System from day one and with the Arkansas Highway Employees Retirement System from the first year. Thus, does the state deny equal protection of the laws in making such a distinction (is there a "rational basis" for the distinction)? Second, is forcing the membership to contribute for up to five years when the member has a property right to return of the funds on leaving public employment a taking, damaging, or appropriation without just compensation? The third claim was a pendent state constitutional and statutory construction issue. Only the first issue is presented to this Court.

2. APERS

The Arkansas General Assembly created the APERS in 1957 "in order to retain and recruit efficient and skilled state employees." 1957 Ark.Acts 177, § 17; § 12-2512 note; S,¶ 5.2. The APERS is governed by a Board of Trustees which has comprehensive power of the operation of the System and investment of the funds it receives. § 12-2503; S,¶ 1.4.

The legislature provided that all covered employees were required to become members of the System as a condition of their employment. § 12-2506; S,¶ 3.2. The covered employees include state constitutional officers and legislators, state employees, county employees, and non-teaching or -administrative school employees. S,¶ 1.3. Differing groups may have different benefit eligibility. Teachers and employees of the Arkansas State Highway Department are covered by separate plans. Ark.Stat.Ann. §§ 80-1441 et seq. (Repl. 1980) (teachers) & 76-1901 et seq. (Repl. 1981) (highway employees).

APERS provides retirement benefits to those members remaining in the System long

enough to qualify for retirement. See § 12-2510 et seq. Benefits are funded by public employer and employee contributions, §§ 12-2508, -2508.1, -2509, -2509.1, and the contributions are invested, and the investment income increases the assets of the system as a whole. §§ 12-2513, 12-3306, 12-3307; S,¶s 4.3,4.6,4.16,5.3. The system had assets of $360,000,000 as of June 30, 1980 with a rate of return of 9.10%.[3] S,¶ 5.3. The assets are, in substantial part, comprised of interest earned on contributions of members made and later returned to them without interest.[4] S,¶s 4.6,4.14.

When a member leaves the system by resignation or termination, he may withdraw his contributions with 3% interest provided he has had contributions on deposit with APERS for five years or more. If he has

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3. The total amount of interest at issue has not yet had to be determined. It has variously been estimated at two to four million dollars. Petitioner's individual claim is perhaps $200.

4. APERS assets are not considered by the state to be its money, rather, it belongs to the membership of APERS, so there is no eleventh amendment problem here.

had contributions on deposit less than five years, only his contributions are refunded to him. § 12-2511(C)(a).

Effective in 1978, the Arkansas legislature passed a comprehensive act to make uniform the covered retirement systems. § 12-3301 et seq. One part of that act made the covered systems voluntarily contributory as to those who were members before 1978. § 12-3303(3.02); S,¶ 3.7. Petitioner became a noncontributory member. S,¶ 3.7. A legislative finding in that act stated that a uniform retirement policy of the State of Arkansas was its goal "to maintain employee morale." 1977 Ark.Acts 793, § 12; § 12-3309 note.

During the fiscal years 1976-1978, there was an average of 35,078 members of APERS. PX 4, Sch.17. During that period 1,426 former members or their beneficiaries began receiving retirement benefits, id., but 28,053 members resigned or were terminated. PX 3, at 7; PX 4, at 9. Of that 28,053, about 86.8% received no interest on their contributions. PX 5. The average period of employment for those receiving no interest was about one year and four months

and eight and one-half years for those receiving interest. See PX 5. The approximately 24,000 leaving APERS without interest payments received about $10,000,000 in interest-free refunds. Id.; PX 4, Sch.17. Apparently, the 3% interest incentive is not having much effect in "retain[ing] . . . efficient and skilled employees" when 86.8% of the workforce leaves in less than five years. For every retiree, twenty employees work less than five years, and most retirees do not even work a full twenty years. See PX 1, Sch.9; PX 2, Sch.8; PX 4, Sch.17.

3. The Other Two Retirement Plans at Issue

The crux of this case is disparate treatment by the state between the members of APERS and teachers and highway employees.

Teachers are members of the Teacher Retirement System, and they are paid interest from the first day of contributions. § 80-1442(8.02)(a,b); S,¶ 5.1. They have received full interest payments from day one since their system was created in 1937 and nothing in the legislation then says why.

Highway employees are members of the Arkansas State Highway Employees Retirement System, and they received interest from the end of the first year. § 76-1912(c). It was created in 1947, and prior to 1979, highway employees only received interest from the fifth year as well. 1979 Ark.Acts 126, § 2. There also is no stated legislative purpose or findings for this change. The emergency clause for the 1979 amendment simply states that the piece of legislation was an "essential governmental program[]." Id., § 4; § 76-1912 note.

Both systems are funded substantially the same as APERS. There is nothing else in the record about these systems, their members, or whatever.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW FINDING A RATIONAL BASIS ON THIS RECORD IS CONTRARY TO THE DECISIONS OF THIS COURT.

(1) Petitioner asserted below that the distinction that the state has drawn here between the former members of the three retirement systems involved is arbitrary and lacks a rational basis. The state admitted both in the District Court and the Court of Appeals that "the lines drawn are arbitrary," but argued that "a line has to be drawn somewhere" and this one is as good as any. The District Court accepted this argument and found a rational basis for the distinction in the legislation solely from the arguments advanced by the state in its trial brief. See A-10-A-11, infra. The Court of Appeals affirmed relying entirely on the District Court's finding of a rational basis and upheld the statute under the fourteenth amendment. See A-4-A-5, infra. The argument made here by petitioner was made in the courts below and rejected.

Petitioner submits that the lower courts

erred in finding a rational basis for this statute on this record according to the decisions of this court.

(2) The record in this case is singularly devoid of any showing of a rational basis for the distinction the state has drawn. The distinction drawn is admittedly arbitrary; there is nothing in the three statutes nor the legislative findings which shows the purpose of the distinction; and there is no legislative history whatsoever. All the District Court had to rely on was the mere argument of the state attorney general that:

> the Teacher Retirement System was created 20 years prior to APERS and that it therefore operates differently from APERS from an actuarial standpoint. Furthermore, the argument is made that the Teachers Retirement System covers a single profession and that teachers are more likely to be long-term employees than the professionally diverse members of APERS. In comparing APERS to the Teachers Retirement System, it is clear the teachers would be far more likely to remain in the system than would the members of APERS, an organization which encompasses nearly all state, county and municipal employees. [A-10-A-11, infra]

(3) In every economic equal protection case decided by this Court at least since

the Court began considering equal protection cases in a thoughtful manner, rather than merely deferring to the legislative branch, there has at least always been evidence in the record, legislative findings, or an obvious legislative construction to support the discrimination as having a "reasonable basis" or "rational basis." See, e.g., San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973); Johnson v. Robinson, 415 U.S. 361, 381-82 (1974); City of Charlotte v. Local 660, International Association of Firefighters, 426 U.S. 283, 287-88 (1976); New Orleans v. Dukes, 427 U.S. 297 (1976); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 311 (1976); Mathews v. DeCastro, 429 U.S. 181, 185-89 (1976); Califano v. Goldfarb, 430 U.S. 199, 212-13 (1974); Friedman v. Rodgers, 440 U.S. 1 (1979); Harrah Ind. School Dist. v. Martin, 440 U.S. 294 (1979); New York City Transit Authority v. Beazer, 440 U.S. 568 (1979); U.S. Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 168-72 nn.1-7 (1980); Schweiker v. Wilson, 450 U.S. 221, 224-26 (1981).

As Justice Brennan said dissenting in

U.S. Railroad Retirement Bd. v. Fritz, supra, 449 U.S. at 184:

> Nonetheless, the rational-basis standard "is not a toothless one," [Mathews v. Lucas, 427 U.S. 495, 510 (1975)], and will not be satisfied by flimsy or implausible justifications for the legislative classifications, proffered after the fact by Government attorneys. See, e.g., Jimenez v. Weinberger, 417 U.S. 628 (1974); U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973); U.S. Dept. of Agriculture v. Murry, 413 U.S. 508 (1973); James v. Strange, 407 U.S. 128 (1972). (bracketed material added)

(4) Here, the state has proffered justifications which have no basis in the record, the legislation itself nor legislative history, nor even necessarily reason or logic.

Actuarial standpoint. The claim that the Teacher Retirement System is more actuarially sound is belied by the fact that system has always paid full interest since 1937. Also, the highway employees system suddenly just changed to a shorter term without regard to to actuarial soundness. It is merely a hypothetical justification with no basis in the legislation, evidence, record, or even reason.

Teacher longevity. Teacher longevity is also proffered, but, again, there is no-

thing in the record to support it. Actual fact could very well be to the contrary. See, e.g., H. BROUDY, THE REAL WORLD OF PUBLIC SCHOOLS (1972), ch. III (The Professional Teacher--A Mischievous Illusion); McGuire, Teacher Burnout, TODAY'S EDUCATION (Nov.-Dec. 1979), at 5; Wanted: A Few Good Teachers, U.S. NEWS & WORLD REPORT (Sept. 1, 1980), at 102.

The same proposition that the state argues here could be made from both sides of the proposition: i.e., teachers receive interest from the first day because they may stay longer and it does not matter because (a) they happen to leave early or (b) they stay in the system until retirement.

Both arguments are only tautological assertions: The attorney general substantially argues that the state did what it intended to do. If so, they do not support the conclusion under the rational basis test. See Fritz, supra, 449 U.S. at 180 (Stevens, J., concurring). Also, what if the actual facts are contrary to the proffered justifications? Teachers reportedly feel great job dissatisfaction and are leaving the profession but still being

replaced. Also, declining enrollment rates and layoffs because of funding reductions have lessened the need for teachers. See, e.g., Hard Times for Teachers, TIME (July 7, 1975), at 30; Layoffs Spread--Among Teachers, U.S. NEWS & WORLD REPORT (April 26, 1976), at 65; The state's proffered justifications are clearly susceptible of proof, but they have never been tested by the litigation process and cross-examination. The state has merely proposed a "rational basis" for legislation out of "thin air," and the decisions below give it constitutional sanction under the equal protection clause of the fourteenth amendment. It has become a self-fulfilling prophecy.

Whatever is permissible to show a "rational basis" for ecomonic legislation, the decisions of this Court do not sanction such blatant bootstrapping of a "rational basis" into a record and legislation devoid of such purpose.

II. THIS CASE INVOLVES A SIGNIFICANT AND RECURRING ISSUE UNDER THE RATIONAL BASIS EQUAL PROTECTION STANDARD WHICH SHOULD NOW BE RESOLVED.

(1) Later in the 1980 Term after Fritz, the Court was faced in Schweiker v. Wilson, 450 U.S. 221 (1981), with a substantial rational basis equal protection challenge of a statute which divided the Court 5-4. The majority held that the "sparse" legislative history still tended to support the articulated purpose of the statute and did, therefore, satisfy the reasonable basis standard. Id. at 234-37.

Justice Powell, writing for himself and Justices Brennan, Marshall, and Stevens, dissented because the statute served no identifiable purpose and should be struck down.

> The deference to which legislative accommodation of conflicting interests is entitled rests in part upon the principle that the political process of our majoritarian democracy responds to the wishes of the people. Accordingly, an important touchstone for equal protection review of statutes is how readily a policy can be discerned which the legislature in tended to serve. See,

e.g., U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 536-538 (1973); McGinnis v. Royster, 410 U.S. 263, 270 (1973). When a legitimate purpose for a statute appears in the legislative history or is implicit in the statutory scheme itself, a court has some assurance that the legislature made a conscious policy choice. Our democratic system requires that legislation intended to serve a discernible purpose receive the most respectful deference. . . . Yet, the question of whether a statutory classification discriminates arbitrarily cannot be divorced from whether it was enacted to serve an identifiable purpose. When a legislative purpose can be suggested only by the ingenuity of a government lawyer litigating the constitutionality of statute, a reviewing court may be presented not so much with a legislative policy choice as its absence.

In my view, the Court should receive with some skepticism post hoc hypotheses about legislative purpose, unsupported by the legislative history. When no indication of legislative purpose appears other than the current position of the Secretary, the Court should require that the classification bear a "fair and substantial relation" to the asserted purposes. See F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). This marginally more demanding scrutiny indirectly would test the plausibility of the tendered purpose, and preserve equal protection review as something more than a "mere tautological recognition of the fact that Congress did what it intended

to do." Fritz, supra, at 180 (Stevens, J., concurring in judgment). (emphasis added; footnotes omitted)

Here, there is no legislative history, there is no articulated purpose in the statute which supports the state's argument, and there is no evidence in the record of any legislative purpose. The state admits that its discriminatory scheme is arbitrary, but it seeks to justify the distinction by a proffered post hoc and hypothetical argument of counsel of legislative purpose. For all we know, this argument could be a cover for an invalid, unarticulated legislative purpose for the discrimination--like rewarding a more politically powerful group of public employees.

(2) The 1977 statute expressly sought "to make uniform" the benefit provisions of all the Arkansas retirement systems. See page 10, supra. The state has, in fact, sought to do that somewhat in 1979 by changing the period of time members of the highway employees retirement system must wait to get interest on their contributions. There has, however, conspicuously been no effort to similarly adjust the interest payment eligibility of APERS

members.

The express purpose of the 1977 legislation is not remotely served by the statute as to interest eligibility. In fact, the failure of the legislature to act in accord with its purported purpose runs counter to this purpose and belies any "rational basis" for the legislation.

(3) The state's proffered justiciation also falls into the realm of a "permanent irrebuttable presumption" where that presumption is neither necessarily nor universally true in violation of the due process clause of the fourteenth amendment. See, e.g., Cleveland Bd. of Education v. LaFleur, 414 U.S. 632, 646 (1974); Vlandis v. Kline, 414 U.S. 441, 446 (1973).

(4) This case seems to be a result of a progression of rational basis equal protection cases where "the mode of analysis employed by the Court . . . virtually immunizes social and economic classifications from judicial review"; Fritz, supra, 449 U.S. at 183 (Brennan, J., dissenting); and this is constitutionally erroneous. There was no meaningful judicial review below. The state's argument of rational basis was

accepted by the lower courts without question over petitioner's strenuous objection in the briefs.

This case now provides the vehicle to resolve the significant problems in applying the rational basis standard under the fourteenth amendment raised by the concurring and dissenting opinions in Fritz and the dissenting opinion in Schweiker. The facts of this case are clear and simple, and the issue is well defined on this record making the issue ripe for decision by this court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix

U.S. Court of Appeals for the Eighth Circuit decision (February 12, 1982) A-1

U.S. District Court for the Eastern District of Arkansas decision (July 13, 1981) A-6

APPENDIX A

[Filed Febuary 12, 1982; presently unreported but submitted for publication]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1844

John W. Hall, Jr., *

Appellant, *

v. *

Board of Trustees of Arkansas Public Employees Retirement System, and William Fleming, Col. Kenneth Milhoan, Nancy Hall, Jimmie Lou Fisher, Dr. R.L. Qualls, Fay Mathis, Marion Hickey, Edwin Fults, and Edwin Waddell, Trustees of the Arkansas Public Employees Retirement System, and Fred Henne, Director of the Arkansas Public Employees Retirement System, *

Appellees. *

Appeal from the United States District Court for the Eastern District of Arkansas

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Submitted: January 15, 1982
Decided: February 12, 1982

Before BRIGHT, ROSS and STEPHENSON, Circuit Judges

PER CURIAM.

This action was brought under 42 U.S.C. § 1983 by a former deputy prosecuting attorney in Pulaski County, Arkansas on behalf of himself and a certified class of of former public employees against the Board of Trustees of the Arkansas Public Employees Retirement System, together with the individual trustees and director thereof.

Plaintiff worked as a deputy prosecuting attorney from June 1, 1973, until June 1977. During this period he was required by law to pay a percentage of his salary into the Arkansas Public Employees Retirement System according to Ark.Stat.Ann. § 12-2501, et seq. in the total amount of $2,115. Under the law then in effect, Arkansas Public Employees Retirement System (APERS) members who left public employment before the end of their fifth year received reimbursement of their contribution to the plan, but without interest. Those who left public employment after five years could

withdraw their contributions, together with three percent interest from the original date of employment. The certified class in this case includes only former public employees covered by APERS who terminated their employment prior to the expiration of five years from their initial date of employment. Plaintiff estimates there are 24,000 former public employees in this class.[1]

Arkansas has two other similar retirement plans. One covers teachers and one covers highway employees. Teachers who resign receive interest on the funds they contributed from the date of deposit. Since 1979 highway employees who resign receive interest form the end of the first year of their employment. Prior to 1979 they received interest only if they had been so employed for five years.

Plaintiff claims that the discrepancy in treatment among former APERS employees, vis-a-vis former teachers and former highway employees, denies equal protection to

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[1] On January 1, 1978, the entire system became noncontributory.

the former APERS employees. He further claims that it constitutes an unjust taking of the property of his class in violation of the fifth and fourteenth amendments to the United States Constitution and in violation of Article 2, § 22 of the Arkansas Constitution, or both.[2]

These claims were considered by the United States District Court for the Eastern District of Arkansas,[3] and on July 13, 1981, an opinion was filed denying the claims of plaintiff and his class. The district court found a rational basis for the differences among the three plans, relying on United States Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980), and dismissed the federal claims with prejudice and the state constitutional pendent jurisdiction claim without prejudice.

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[2] The claim relating to the violation of the Arkansas Constitution is a pendent claim to the equal protection and unjust taking of property claims of plaintiff and his class.

[3] The Honorable Henry Woods, United States District Judge for the Eastern District of Arkansas.

We have closely examined the record, the briefs and the trial court's opinion and affirm the judgment of the district court on the basis of the reasoning expressed in that opinion pursuant to Rule 14 of the Rules of this court.

Affirmed.

APPENDIX B

[Filed July 13, 1981; unreported]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

JOHN W. HALL, JR. Plaintiff

v. No. LR-C-79-413

BOARD OF TRUSTEES OF THE ARKANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, and WILLIAM FLEMING, COL. KENNETH MILHOAN, NANCY HALL, JIMMIE LOU FISHER, DR. R.L. QUALLS, FAY MATHIS, MARION HICKEY, EDWIN FULTZ, and EDWIN WADDELL, Trustees of the Arkansas Public Employees Retirement System, and FRED HENNE, Director of the Arkansas Public Employees Retirement System Defendants

MEMORANDUM AND ORDER

The plaintiff in this case is challenging the constitutionality of the Arkansas Public Employees Retirement System (APERS). Since the parties have entered into a stipulation, only a brief statement of the facts will be necessary. APERS, which is contained in Ark.Stat.Ann. § 12-2503(a) et seq., governs the retirement system covering "state constitutional officers and legislators, state employees and constitu-

tional officers, some municipal employees, and non-teaching or administrative school employees."

Prior to January, 1978 all employees covered by APERS were required to contribute to the system. If an employee retired or was terminated before completing five years of service, the contributions to the retirement system were returned in full without interest. However, those employees whose contributions remained on deposit more than five years received approximately 3% interest when their contributions were withdrawn. On January 1, 1978, the entire system became noncontributory. Ark.Stat. Ann. §§ 12-3301, et seq. (Repl. 1980).

In contrast to APERS, members of the Arkansas State Teachers Retirement System who resigned or were terminated received interest from the date of deposit.

The parties stipulated to a class which was certified by this court. The class is defined as follows:

> All persons who are (a) former employees of participating public employers and former members of the Arkansas Public Employees Retirement System; (b) who were members of the contributory plan

> and elected to be members of the noncontributory plan effective January 1, 1978; (c) who had contributions standing in their accounts less than five years on December 31, 1979; (d) who have received and accepted refunds of those contributions; (e) whose refunds were made wihtout interest. [Class Certification Order, at 3]

The plaintiff is a member of the class who withdrew his contributions to APERS on December 31, 1979. Since the plaintiff had been a state employee for less than five years, his contributions were refunded without interest.

The plaintiff challenges this system on three grounds. He first attacks the constitutionality of the classifications alleging that there is an equal protection violation in refusing to pay interest on those contributions on deposit for less than five years.

With regard to this portion of the plaintiff's argument, we feel that we are bound by the Supreme Court's recent decision in United States Railroad Retirement Board v. Fritz, ___ U.S. ___ (Dec. 9, 1980). There Congress restructured the Railroad Retirement Act of 1974 and in so

doing divided employees into various groups. Windfall benefits were in part based upon length of service and the employee's "current connection" with the railroad industry. On appeal it was argued that the proposed plan irrationally distinguished between classes of annuitants. The court, however, rejected this contention and in doing so relied upon the cases of Dandridge v. Williams, 397 U.S. 41 (1970) and Jefferson v. Hackney, 406 U.S. 435 (1972). The following quotation from Dandridge, supra appears in the opinion:

> "In the area of economic and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' Lindsley v. Natural Carbonic Gas Co., 202 U.S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations--illogical, it may be, and unscientific.' Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 68-70. . . .
>
> "[The rational basis standard] is true to the principle that the Fourteenth Amendment gives the federal

courts no power to impose upon the States their views of what constitutes wise economic or social policy."

In expanding on the language in Dandridge, the court also stated:

> Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision." Flemming v. Nestor, 363 U.S. at 612, because this Court has never insisted that a legislative body must necessarily engage in a process of line drawing. The "task of classifying persons for . . . benefits . . . inevitably requires that some persons who have an almost equally strong claim to favorite treatment be placed on different sides of the line," Mathews v. Diza, 426 U.S. 67, 83-84 (1970), and the fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.

While there is no legislative history of the Act now before the court, the defendant has advanced several justifications for the different classifications. In the first place, it is noted that the Teacher Retirement System was created 20 years prior to APERS and that it therefore operates differently from APERS from an actuarial standpoint. Furthermore, the argument is

made that the Teachers Retirement System covers a single profession and that teachers are more likely to be long-term employees than the professionally diverse members of APERS. In comparing APERS to the Teachers Retirement System, it is clear the teachers would be far more likely to remain in the system than would the members of APERS, an organization which encompasses nearly all state, county and municipal employees.

While the lines of demarcation between members of the Teachers Retirement System and members of APERS and the classifications within APERS itself may not be perfectly drawn, we do find that there is a rational basis for these distinctions. Furthermore, we are in philosophical agreement with the statement contained in Confederation of Police v. City of Chicago, 481 F. Supp. 566 (N.D.Ill., E.D. 1980). There the court reasoned:

> Surely the court should not sit as a board of review for every decision of a state agency concerning employment conditions for different classes of government employees. If plaintiffs in this case were entitled to relief, then every government employee who feels that he or

> she is entitled to the same salary, vacation schedule, working hours and other employment benefits received by some other government employee may also have an equal protection claim. We would have to compare the functions of the employees in different departments of the government and determine who is entitled to what specific benefits. This is not a proper judicial function. The court is not in a position to assess the budgetary needs and employment requirements of the various governmental agencies and the value of the services provided by them. See generally, Hawkins v. Preisser, 164 N.W.2d 726 (Sup.Ct.Iowa 1978). Neither side has referred us to a case in point, nor have we found one in our own research. Our anaylsis is result oriented, and we think that it is appropriate in these circumstances. At 568-69.

See also Muzquiz v. City of San Antonio, 520 F.2d 993 (5th Cir. 1975).

The plaintiff has also challenged the retirement system on the grounds that the failure to pay interest is an unconstitutional taking. Since it has on numerous occasions been determined that nonrefundable contributions to a retirement fund do not violate the Fourteenth Amendment, we do not see how the refusal to pay interest on refundable contributions is such a violation. Clearly, had the Arkansas Legisla-

ture determined that employees with less than five years of service should forfeit all of their contributions, it would not have run afoul of the constitution in so doing. Accordingly, we hold that the non-payment of interest is not in the case an unconstitutional taking. Pennie v. Reis, 132 U.S. 404 (1889); Anderson v. United States, 205 F.2d 326 (9th Cir. 1953); Stouper v. Jones, 284 F.2d 240 (1960).

Finally, the plaintiff requests that we assume pendent jurisdiction over his claim that Ark.Stat.Ann. § 12-1505(a) has been violated in that the cost of administering APERS has been borne by APERS members rather than the State.

The exercise of pendant jurisdiction is not a matter of right but rather within the court's discretion. United Mine Workers v. Gibbs, 383 U.S. 715 (1966). After reviewing this claim, we must conclude that the state courts provide an approriate forum for the resolution of this controversy. A decision by this court would involve an unnecessary review of state law before the state courts have had an opportunity to pass upon the validity of the system.

In accordance with this opinion, the federal claims are hereby dismissed with prejudice and the plaintiff's state constitutional claims and state statutory claims are dismissed without prejudice.

IT IS SO ORDERED this 13 day of July, 1981.

/s/ Henry Woods
HENRY WOODS,
U.S. District Judge

Opposition

Office - Supreme Court, U.S.
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NO. 81-1880

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

JOHN W. HALL, JR. — *Petitioner*

vs.

BOARD OF TRUSTEES OF THE ARKANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, ET. AL. — *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION

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QUESTION PRESENTED FOR REVIEW

WHETHER ARGUMENT OF COUNSEL PROVIDING THE RATIONAL BASIS FOR ECONOMIC LEGISLATION IS SUFFICIENT TO SUSTAIN THE LEGISLATION UNDER AN EQUAL PROTECTION CHALLENGE WHERE A LEGISLATIVE DISTINCTION BETWEEN CLASSES OF PUBLIC EMPLOYEES IS NECESSARILY ARBITRARY AND THE LEGISLATIVE PURPOSE IS SHOWN BY THE CHALLENGED STATUTE.

PARTIES TO THE PROCEEDINGS

Petitioner is a former public employee and former member of the Arkansas Public Employees Retirement System who represents a class of former employees and members.

Respondents are the Members of the Board of Trustees of the Arkansas Public Employees Retirement System and the Director of the Arkansas Public Employees Retirement System.

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STATEMENT OF THE CASE

The State of Arkansas provides several retirement plans for various categories of its employees. The statutory differences between the Arkansas Public Employees Retirement System and two of the other plans, Teachers Retirement System and Highway Department Employees Retirement System, is challenged in this case as being violative of the Equal Protection clause of the Fourteenth Amendment to the United States Constitution.

Petitioner is a former public employee and former member of the Public Employees Retirement System. That system provides coverage for a variety of state, county and municipal employees. Petitioner was a member for less than the period of time required by statute under that plan to receive interest on his contributions when they were withdrawn.

Members of two of the other systems, Teachers and Highway Department Employees, have different time periods of required participation before interest is paid on withdrawn contributions.

The case was submitted on stipulated facts and the briefs of the parties. Several aspects of the operation of the Arkansas Public Employees Retirement System were challenged. Only the question of whether the varying membership time requirements are violative of equal protection is raised by Petitioner in this petition.

Both the District Court and the Court of Appeals found that a rational basis for the differences existed. Those decisions were grounded on the statutes creating the various systems, the argument of counsel and the prevailing standards for equal protection analysis set down by this Court.

REASON FOR NOT GRANTING THE WRIT

THE DECISIONS BELOW FINDING A RATIONAL BASIS ARE CONSISTENT WITH RECENT DECISIONS OF THIS COURT.

Shortly after the completion of the briefing schedule set down by the District Court, this Court handed down the decision in *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980). The District Court correctly held that it was bound by that decision since it addressed the very issue of which Petitioners complained, i.e., whether a retirement plan which treats classes of annuitants in a different manner is violative of equal protection.

The *Fritz* case, *supra*, involved a challenge to Congressional enactments which brought about changes in benefits available to various classes of participants in the railroad retirement system. The similarity in the facts presented by that case and the instant matter, as well as the legal issues involved, makes it dispositive of this case. It is for this reason that lengthy quotes from *Fritz* are necessary.

After a brief review of some earlier cases involving equal protection challenges to social and economic legislation, the opinion states:

> In more recent years, however, the Court in cases involving social and economic benefits has consistently refused to invalidate on equal protection grounds legislation which it simply deemed unwise or unartfully drawn.

Quoting from *Dandridge v. Williams*, 397 U.S. 471, 485-86, the opinion continues:

> In the area of economic and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its law are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, [55 L.Ed. 369, 31 S.Ct. 337]. "The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific." *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 68-70, [57 L.Ed. 730, 33 S.Ct. 441]. . . .
>
> [The rational basis standard] is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.

And in *Flemming v. Nestor*, 363 U.S. 603, 611 (1960), it was said:

> It is not within our authority to determine whether the congressional judgement expressed in that Section is sound or equitable, or whether it comports well or ill with purposes of the Act. . . . The answer to such inquiries must come from Congress, not the Courts. Our concern here, as often, is with power, not with wisdom.

The purpose of the Public Employees Retirement System is stated at Ark. Stat. Ann. §12-3309(n.), which is the emergency clause of Act 793 of 1977. There it was said:

> It is hereby found and determined by the General Assembly that the establishment of a uniform retirement policy for the State of Arkansas is essential to maintain employee morale and a stable and improved retirement system commensurate with the ability of the taxpayers of this State to finance, yet without jeopardizing retirement benefits of persons now employed by the State who do not elect to participate in the new retirement plan.

The above quoted provision is the basis for the System as a whole and the General Assembly apparently was of the opinion that the mechanism created by it was the most feasible for achieving the desired result.

Petitioner raises the argument that the State presented no justification for the alleged discrimination other than argument of counsel. Petitioner cites *Schweiker v. Wilson*, 450 U.S. 221 (1981), albeit the dissenting opinion, to decry the use of *post hoc* argument as evidence of the justification. It should be noted that *Schweiker* was decided on a Motion for Summary Judgment, 450 U.S. at 228, and it is doubtful that any evidence was presented by either side in that litigation other than argument of counsel. The standard that Petitioner seeks to impose at this phase of the litigation is one that is expressed only in the dissenting opinion of the cases cited. In that regard, this Court's attention is directed to footnote 10 of the *Fritz* case, *supra*, wherein it is said:

> The comments in the dissenting opinion about the proper cases for which to look for the correct statement of the equal protection rational basis standard, and about which cases limit earlier cases, are just that; comments in a dissenting opinion.

CONCLUSION

For the above reasons the Writ of Certiorari should be denied.

Respectfully submitted,

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